

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ALFONSO ORTIZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>EXCEL CORPORATION</b>	)	Docket Nos. 180,732
Respondent	)	180,733
Self-Insured	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Claimant requests review of the preliminary Order Denying Medical Treatment by Special Administrative Law Judge Leroy C. Rose entered in these proceedings on November 7, 1995.

**ISSUES**

The Special Administrative Law Judge denied claimant's request for medical treatment and change of treating physician. In his Application for Workers Compensation Board Review "[t]he specific issues the Claimant desires to address in this review are:

- "1. The Special Administrative Law Judge exceeded his jurisdiction by denying medical treatment for the Claimant.
- "2. The Special Administrative Law Judge exceeded his jurisdiction by denying a change of treating physician.
- "3. The Special Administrative Law Judge exceeded his jurisdiction by finding that the employer did not receive timely notice.
- "4. The Special Administrative Law Judge exceeded his jurisdiction by not finding that the employer was prejudiced for lack of notice."

In claimant's brief to the Appeals Board and statements of counsel made at the October 19, 1995 preliminary hearing, the issue of timely written claim was also raised and discussed.

The respondent seeks a dismissal of claimant's application for Appeals Board review on the basis that the Special Administrative Law Judge was within his jurisdiction when he denied claimant's request for additional medical treatment and for change of physician.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds:

The jurisdiction of the Appeals Board to review preliminary hearing orders is controlled by K.S.A. 1995 Supp. 44-551 and K.S.A. 44-534a. The Appeals Board may review preliminary findings pertaining to: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. The Appeals Board is further given the jurisdiction to review preliminary hearing orders if it is alleged the administrative law judge exceeded his or her jurisdiction.

In the preliminary hearing Order before us, the Special Administrative Law Judge held:

"After hearing the evidence and arguments of counsel, it is found: That change of physicians should be denied . . . ."

K.S.A. 44-534a confers upon an administrative law judge the authority to make preliminary orders concerning the furnishing of medical treatment. The Appeals Board has held this includes the authority to designate a treating physician where treatment is not being provided, as well as ordering a change of authorized physician pursuant to K.S.A. 44-510(c)(1). Accordingly, the jurisdiction of the Appeals Board to review the subject preliminary hearing order requires a determination of the basis for the Special Administrative Law Judge's Order.

The Appeals Board recognizes that the Workers Compensation Act does not specifically require an administrative law judge to provide a statement of the basis for his denial of benefits. However, when benefits are denied and the denial may have been based on a finding not subject to review, the Appeals Board cannot perform its obligations under the Act without an indication by the Judge as to the basis for his decision. In the absence of such an indication, the Appeals Board would have no alternative but to remand the matter to the administrative law judge to add to his order a brief sentence or statement explaining the basis for his denial of benefits.

In this case, the respondent alleges that the denial of benefits was not based upon a jurisdictional determination as to the compensability of the claims, but was instead based upon a factual determination from the evidence that proper medical treatment was

provided to the claimant. Conversely, claimant argues that the Special Administrative Law Judge's Order constitutes a finding as to the compensability of the claims, specifically, a finding that the employer did not receive timely notice and/or that written claim was not timely given. Obviously, the Special Administrative Law Judge's Order provides no insight as to the basis for the denial of benefits. We, therefore, turn to the transcript of the October 19, 1995 preliminary hearing proceedings for guidance. At page 57 of that transcript there appears the following announcement by the Special Administrative Law Judge:

“JUDGE ROSE: I believe that is an accurate statement of the law, that notice is jurisdictional and can be raised at any time. But the primary purpose of notice is to put the respondent on notice as to what the claimant is claiming. And from the testimony I've heard today, it appears that the claimant made some comments to the doctor concerning the shoulders. And I don't find where the records indicate that he made any claims concerning his back. And it appears to me, at this time, that there was not a sufficient notice given, and to simply say 'the body parts' is a generic notice that would fit anything. But no specific notice was given to the respondent as to what they are having a claim made against them on. In such, I am finding that notice was not timely, properly given, and I think that will deposit [sic] us of the other issues.”

We find from the above statement given by the Special Administrative Law Judge at the conclusion of the preliminary hearing that the basis for his denial of the claimant's request for medical treatment and change of physician was, as to the back injury, based upon his finding “that notice was not timely, properly given.” The injury to the claimant's back is one of the affected body parts alleged as affected by the accident which is the subject of Docket No. 180,732. Unfortunately, the record is not clear as to the basis for the denial of medical treatment and change of physician with regard to the injury to the shoulders, which is the subject of the claim in Docket No. 180,733. Timely notice and written claim do not appear to be at issue in that case, at least insofar as the left shoulder is concerned. If, as respondent contends, the denial of claimant's request was based solely upon a finding that claimant had received appropriate medical treatment for the shoulders in Docket No. 180,733, then the Appeals Board would not have a jurisdictional basis to review that finding on an appeal from a preliminary hearing order. Since the only indication we have in the record which ties a denial of benefits to a finding which deals directly with the compensability of the claim is to the back injury in Docket No. 180,732, it would appear, by implication, that the denial of benefits, as to the shoulders in Docket No. 180,733, was not based upon an issue as to the compensability of that claim.

It is clear from the record, and the Appeals Board finds, that the denial of medical treatment and change of physician in Docket No. 180,732 by the Special Administrative Law Judge was based upon a finding that notice of the back injury component of that claim was not timely and properly given. Docket No. 180,732 arises out of an alleged accident which is claimed to have occurred on or about May 18, 1993 as a result of a slip and fall at work. A Form E-1, Application For Hearing, was filed with the Division of Workers Compensation on July 21, 1993 alleging a May 1993 injury to the “[r]ight knee, other areas to be determined.” A letter by claimant's counsel was sent by certified mail to the

respondent on September 13, 1993 stating that claim was being made for injury to the right knee and leg or all parts being affected by injury. Claimant filed on September 26, 1995 an amended Form E-1 in Docket No. 180,732 alleging injuries to the "[r]ight knee, right hip, back and all parts injured or affected by injury, including any and all aggravations of preexisting conditions". Respondent's counsel argues that the original Form E-1 did not put it on notice of a back injury and, furthermore, does not constitute written claim for injury to the back. Claimant contends that the language "other areas to be determined" placed respondent on notice that other parts of the body were injured and, furthermore, that the language "all parts injured or affected by injury" as contained in the letter of September 13, 1993, would likewise include the back.

Susan Stevens, the Workers Compensation Coordinator for respondent, Excel Corporation in Dodge City, Kansas, since July of 1991, testified at the October 19, 1995 Preliminary Hearing that the first mention of a back injury given to the respondent came from claimant's counsel at the benefit review conference of March 1, 1994. However, Ms. Stevens later concedes that the claimant did mention his back to the authorized treating physician, Dr. L.T. Fleske, as evidenced by his office note and report to her of November 3, 1993. Claimant's counsel further points out that both the notice of intent letter dated October 21, 1993 and subsequent notice of intent letters dated December 13, 1993 and February 4, 1994, request medical treatment with an orthopedic specialist for the shoulders and the subsequent notice of intent letters also specifically mention the back.

The injuries which are the subject of this appeal all are alleged to have occurred prior to July 1, 1993. The notice statute in effect at that time, K.S.A. 44-520 (Ensley), read:

"Notice of injury. Proceedings for compensation under the workmen's compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, shall have been given to the employer within ten (10) days after the date of the accident: *Provided*, That actual knowledge of the accident by the employer or his duly authorized agent shall render the giving of such notice unnecessary: *Provided further*, That want of notice or any defect therein shall not be a bar unless the employer prove that he has been prejudiced thereby."

Claimant contends that the respondent has failed to meet its burden of proving prejudice by any delay in notice of injury. The Appeals Board agrees. The record does not establish what the respondent could have or would have done differently had notice of the back injury been given sooner. Furthermore, K.S.A. 44-520 (Ensley), requires only that the respondent be given notice of accident and not notice of each and every body part that may have been injured as a result thereof. There is no dispute but that claimant timely reported his slip and fall at work. Even if claimant initially only reported injury to his right knee, the Appeals Board finds that the mandate of the notice statute has been complied with. Accordingly, the finding by the Special Administrative Law Judge that the claimant failed to give timely and/or proper notice in Docket No. 180,732 is reversed. That case should be remanded to the Special Administrative Law Judge for further findings and/or proceedings consistent with this Order. Furthermore, as it appears that the finding of no

timely notice in Docket No. 180,732 cannot also be the basis for the Order Denying Medical Treatment, in Docket No. 180,733, the Special Administrative Law Judge's Order should likewise be remanded for specific findings concerning the basis for any denial of benefits therein, and/or for further proceedings consistent with the Appeals Board's findings herein.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that these proceedings should be, and hereby are, remanded to the Special Administrative Law Judge for further proceedings consistent with the findings and orders of the Appeals Board herein, and with specific instructions to state the reasons for any denial of claimant's request for benefits. The Appeals Board does not retain jurisdiction over these proceedings.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Emporia, KS  
David Rebein, Dodge City, KS  
Rebecca Crotty, Garden City, KS  
Leroy C. Rose, Special Administrative Law Judge  
Philip S. Harness, Director